No. 2829

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA STEAMSHIP COMPANY, Owner and Claimant of the Steamship "Seward,"
Appellant,

vs.

ARTHUR J. GILBERT,
Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

BRIEF OF APPELLEE

EIMON L. WIENIR,
Proctor for Appellee.

Suite 303 Maynard Building,
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STATEMENT.

The libelant shipped as night watchman on board the S. S. "Seward" for a voyage from Seattle to Anchorage, Alaska, and return to Seattle, on September 25, 1915, at a monthly wage of fifty dollars ($50.00), and fifty cents (50c) per hour for overtime.

There were no hours of employment specified in the shipping articles, but libelant's usual hours were from six p. m. to six a. m. On a previous trip on the same vessel his hours were from six p. m. to six a. m.; he understood the same hours applied upon the trip in issue, and he was on duty from six p. m. to six a. m., from the time the vessel left Seattle until October 4th, when he was forcibly discharged from the vessel.

On October 3rd, at 5:45 p. m., while preparing to "turn to" his watch, the first mate appeared before libelant and asked him, "Why aren't you on watch?" Libelant replied, "It isn't six o'clock yet," to which the mate replied that it didn't make any difference, he was supposed to be on watch at five o'clock. Libelant then said, "It don't make any difference to me, only I have got an hour more overtime for it." The mate ridiculed the idea of libelant thinking he would be paid overtime, and libelant made the retort that he was too familiar with the rights and duties of a watchman not to know when he had overtime coming to him. The mate then said, "I am mate aboard this ship and I'm going to be mate aboard this ship."

The discussion thus ended. The libelant "turned to" his work as usual that night at six p. m., or a little sooner, and "turned in" at six a. m. the next day, as was his custom. That afternoon, while the ship was

lying at Juneau, the mate tendered libelant the money due him as wages for the voyage to that port. The libelant refused to accept that amount. Subsequently in the evening of that day, the libelant "turned to" his work as usual and after working about an hour or so, the mate came up to him and forcibly ejected him from the ship. Libelant remained at Juneau for the period of ten days before securing his passage to Seattle. His fare from Juneau to Seattle was sixteen dollars ($16.00). This action was brought to recover the wages for the trip, expenses necessarily incurred and five hundred dollars ($500.00) damages.

The court, after reading depositions and hearing witnesses in open court, rendered the following decision:

> "Libelant was employed as night watchman on board the Steamship Seward, September 25, 1915. No hours of employment were specified in the shipping articles. On a previous trip on the same vessel his hours were from six p. m. to six a. m. He understood the same hours applied upon the trip in issue, and he was on duty from six p. m. to six a. m., from the time the vessel left the port of Seattle until the controversy arose some days later. On October 3rd, while preparing to 'turn to' his watch at 5:45 p. m., the first mate asked him, 'Why aren't you on watch?' Libelant replied, 'It isn't six o'clock yet,' to which the mate replied that it didn't make any difference, he was supposed to be on watch at five o'clock, to which libelant replied, in substance, that it would mean an hour overtime for him. There was some further

conversation between libelant and the mate, in which the mate asked libelant whether he would not work unless given overtime, and libelant said he would not, or words to that effect; but proceeded to enter upon the discharge of his duties. He was discharged and taken from the vessel on its arrival at Juneau, Alaska, the following day. The mate tendered to libelant the amount of wages earned to the time of discharge, which the libelant refused. Libelant remained at Juneau, Alaska, for the period of ten days before securing return passage to Seattle. His fare from Juneau to Seattle was $16.00. He has brought this action to recover the wages for the trip, expenses necessarily incurred to return to Seattle, and $500.00 damages.

"No hours of employment were mentioned in the shipping articles. The agreement between the Puget Sound Shipping Association, of which claimant is a member, and the Sailors Union, of the Pacific, of which libelant is a member, provides that the hours of regular seamen shall be from seven o'clock a. m. to five o'clock p. m., with one hour off for lunch, and further provides that the work outside of these hours, 'except such work as is necessary for the immediate safety of the vessel or passengers, cargo and crew,' shall be paid for as overtime. The agreement further provides that quarter-masters, stationmen, and watchmen, when working, shall perform their regular duties without charge for overtime, and provides the hours of such employment to be from seven a. m. to five p. m. These hours manifestly do not apply to night watchmen. Section 13 of this agreement provides, 'Members of the Sailors Union shall use their best judgment at all times, and if in doubt as to what shall be charged as overtime, shall do the work required of them, and then refer the case to the Union for adjustment.' The conduct

of libelant in this case does not indicate that the language employed expressed his real intention, except as a claim under Section 13, *supra,* as he immediately 'turned to' his work and remained aboard the ship until his discharge, at all times manifesting his willingness to do his duty. The fact that no definite hours were prescribed for him by the shipping articles, or by the agreement between the Puget Sound Shipping Association and the Sailors Union of the Pacific, and the hours of six to six having been given him on a prior voyage, and he having continued under the same hours upon this voyage, and the first intimation he had that the hours should be changed was at the time of this conversation, would indicate suggestion for extra time, as it would add an hour to the time previously required of him. There is no showing of disqualification or unfitness for service; nor mutinous or rebelious or contumacious conduct. Under the circumstances, the mate should have dealt with the libelant in a more indulgent spirit. Libelant should not have used the expression to his superior officer which he did, and yet there was nothing disrespectful in the words used, or any suggestion of disrespect or insubordination, even though there was a suggestion of liability for overtime, and the mate would not, under the circumstances, have the right to discharge him. I think the libelant should recover his wages for the trip, the $16.00 fare expended, and $35.00 to reimburse him for the outlay which was occasioned at Juneau, Alaska.

"A decree may be prepared."

Outside of the question of the taxing of costs, which I shall discuss later, the sole question at issue in this case is: Was libelant's conduct such as justified the mate in discharging him?

ARGUMENT.

By appellant's own witnesses it was shown that libelant was a competent watchman; that libelant had had no difficulties with his superiors at any time previous to the 3rd day of October; *that it was at least 5:15 p. m. when the mate asked libelant why he wasn't on watch at 5:00 p. m.* (Apostles p. 75); that the mate never told libelant that his hours of employment had been changed; that, in fact, the mate never before had told libelant to be on watch at 5:00 p. m. (Apostles p. 76). How, then, could libelant have disobeyed the order of his superior officer? It is to be noted that libelant "turned to" his work, almost immediately after the controversy with the mate—within five minutes from that time—and discharged his duties as usual until the next morning (Apostles p. 42). I don't see where there is a scintilla of evidence to base the argument that the conduct of libelant amounted to insubordination and disobedience.

The general rule as to the sufficiency of the grounds for discharging seamen is thus stated in 35 Cyc. 1189:

> "B. DISCHARGE—1. By Master or Owner—a. Grounds.
>
> "Claims for wages are highly favored in admiralty courts, and discharges are not justified for

trivial causes, nor for a single offense, unless of a highly aggravated character. Generally speaking, the causes which justify a discharge before termination of the voyage are such as amount to a disqualification and show the seaman to be unfit for the service, or to be trusted in the vessel. Such causes are continued disobedience or insubordination; mutinous and rebellious conduct persevered in; gross dishonesty, or embezzlement, or theft; habitual drunkenness; or where the seaman is habitually a stirrer-up of quarrels, or by his own fault renders himself incapable of performing his duty. As a general rule the maritime law requires the master to receive back a seaman when he has thus discharged him, if he repents and seasonably offers to return to his duty and make satisfaction, unless the offense for which he was discharged was of an aggravated or disqualifying character."

In the Mentor, 17 Fed. Cases, No. 9427, Circuit Justice Story thus states his conclusions:

"I should be sorry indeed to lay it down as a general proposition, that any act of disobedience by a seaman, however slight, is of course to be visited with a forfeiture of wages, or will justify a master in dismissing him in the course of a voyage. Such a principle, it seems to me, would be very disastrous to the commercial interests of the country, and would involve so many difficulties in its application, that the denial of wages would soon, from the necessities of the case, with reference to the ordinary habits of seamen, introduce an essentially different contract into maritime employment. My opinion is, that the disobedience must either be an act of a very gross nature, involving serious danger, a mischief, or malignancy; or it must be habitual, and produce such a gen-

eral diminution of duty, as goes to the very essence of the contract."

In the same opinion the court says:

"Those judges, in our own courts, who have been called most frequently to administer this branch of law, have certainly not felt themselves bound to inflict the forfeiture of wages for slight misbehavior, whether by disobedience or negligence; and even aggravated offences and very gross acts have been dealt with in a cautious and indulgent spirit. It appears to me that there is much in the reasoning of these enlightened persons, that cannot fail to commend itself to every maritime court."

In *Hutchinson vs. Coombs,* 12 Fed. Cases, No. 6955, Judge Ware states the rule to be:

"That a master has, by the marine law, a right in certain cases to turn a mariner out of the vessel, is admitted. But this he cannot do for slight or venial offences, and certainly not for a single offence, unless of a very aggravated character."

In *Jones vs. Sears,* 13 Fed. Cases, No. 7494, it is said:

"The general rule is that a master in a foreign port may discharge seamen if he cannot retain them on board with safety, but not otherwise."

In *Thorne vs. White,* 23 Fed. Cases, No. 13989, the court held:

"When a mariner is incorrigibly disobedient, and will not submit to do duty and make amends, the master may discharge him."

In the *T. F. Oakes,* 36 Fed. 442, in stating the causes for which a seaman may be discharged, it was held:

> "In my judgment a premeditated and persistent shirking and slighting of duty, as well as a deliberate and continued attitude of insolence and defiance to his superiors, on the part of a seaman, is such a cause; particularly where it appears that the seaman thereby intends to coerce or constrain the master in the discharge of his duty."

No further citation of authorities, I believe, is necessary on this point, the authorities being all agreed as to the essential elements of the rule, though the courts differ in the language used to formulate it.

II.

As to allowance of costs for taking deposition.

The libelant took the testimony of one of his witnesses, who is a seaman about to sail, in good faith, upon the belief that he would not be present when the cause was tried. The ship in which this witness sailed arrived in the city just prior to the time that the case was tried, and the witness was called instead of his deposition read. The sole question on this phase of the appeal is: Should costs for taking the deposition be allowed?

The District Court rendered the following decision:

"It appears that the libelant took the testimony of one of his witnesses who is a seaman about to sail, in good faith, upon the belief that he would not be present when the cause was tried. The ship in which this witness sailed arrived in the city during the time the cause was being tried, or just prior to it being tried, and the witness was called instead of his deposition read. The libelant has taxed the costs of the deposition, and the claimant has moved to retax and disallow the costs.

"The claimant has cited *The Persian,* 158 Fed. 912; *Barnardin vs. Northall,* 83 Fed. 241; *Cahn vs. Monroe,* 29 Fed. 675; *Cahn vs. Gung Wah Lung,* 28 Fed. 396; *Lamb vs. Stone,* 28 Mass. 526. These cases, I do not think, throw any light upon this issue. In *The Persian,* Judge Hough simply held that an attorney's fee for taking a deposition was not chargeable where the deposition was not offered in evidence, and the same holding was made by Judge Baker in *Barnardin vs. Northall,* and in *Cahn vs. Monroe,* it was held that a witness called, and testifying, but not subpoenaed, was entitled to his per diem.

"I think it would be manifestly unjust not to permit costs, where a party takes a deposition in good faith, though the necessity for the taking is eliminated at the time the cause is called for trial and the witness is presented in court for oral examination, direct and cross, rather than reading the deposition, and this view is sustained by *Nead vs. Millersburg Home Water Co.,* 79 Fed. 129, and also by the Supreme Court of California, in *Lomita Land & Water Co. vs. Robinson,* 97 Pac. 10, 18 L. R. A. (N. S.) 1106.

"I think the costs for deposition should be allowed."

I respectfully urge this court to affirm the District Court's ruling on the questions involved in this appeal.

Respectfully submitted,

EIMON L. WIENIR,

Proctor for Appellee.